

The power of the voters to remove an elective officer by recall is set forth in the California Constitution Article II, §§ 13-19, and the California Elections Code §§ 11000 et seq. The Political Reform Act regulates campaign activity in a recall election. All candidates and committees that raise and spend funds in connection with a recall election have full reporting and disclosure obligations under the Act. In addition, several provisions of Proposition 34 are applicable to state officials and candidates involved in a recall effort.

Application of Contribution Limits to State Recall Elections

1. How is a recall election different from a typical election of a candidate for public office?

Recall elections are unique because they have both the characteristics of a ballot measure *and* a candidate election. Most recalls have two distinct parts: 1) Shall the officeholder be recalled from office; and 2) If the officeholder is recalled, who shall replace the recalled official? The first part is the actual recall, and a recall falls within the definition of a “measure” under Section 82043 of the Act. As a result, state law treats recall elections as ballot measures, the “issue” being whether the officeholder should be recalled. In contrast, the second part on the ballot is actually a candidate election, the question being who shall be elected to the vacant office. Because different rules sometimes apply between the two types of elections, the answers to questions about conduct related to “the recall” depend on which part of the election is involved.

2. Is the elected state officer who is the target of a state recall subject to contribution limits and the voluntary expenditure limits? No. Proposition 34 expressly states that an elected state officer who is the target of a recall may accept contributions into a committee established to oppose the qualification of the recall or the recall election without regard to the contribution limits. (Section 85315; Regulation 18531.5.) The target officer is not subject to the voluntary expenditure limits. (Regulation 18531.5.) However, see Question 19 regarding contributions made by other state officeholders and candidates.

3. Are replacement candidates running in a state recall election subject to contribution limits and the voluntary expenditure limits? Yes. Replacement candidates are subject to the contribution limits of the Act put in place by Proposition 34. (Section 85301; Regulations 18531.5 and 18545.) The voluntary expenditure limit provisions also apply to replacement candidates. The contribution and expenditure limits are adjusted at the beginning of each odd-numbered year to reflect changes in the Consumer Price Index. A chart containing the current contribution and expenditure limits for state candidates can be found on the Commission’s web site (www.fppc.ca.gov).

4. Why are replacement candidates subject to the contribution limits if the target elected officer is not? Proposition 34, the campaign contribution limit law passed by the voters in November of 2000, enacted contribution limits that apply to all candidates seeking elective state office. The replacement candidates are seeking elective state office and therefore the contribution limits apply to them. Proposition 34 contained a specific statutory provision, Section 85315, which exempts the target of a recall from the contribution limits when raising funds to defend against a recall. Proposition 34 does not contain any parallel provision excepting

replacement candidates in a recall from the contribution limits that apply as a matter of law to candidates seeking state office.

5. Are there any limits on the amount of personal funds a candidate may expend on his or her own campaign? No. Under the Act, there is no limit on the amount of personal funds a candidate may contribute to his or her own campaign. (Section 85301(d).) However, this may cause an opponent's voluntary expenditure limits to be lifted. (Section 85402.) Also, a candidate may not personally loan to his or her campaign an amount, the outstanding balance of which, exceeds \$100,000. (Section 85307.)

6. May a local jurisdiction impose contribution limits on the subject of a recall election and replacement candidates? Nothing in the Act prohibits a local jurisdiction from imposing contribution limits on the subject of a recall election or a replacement candidate, so long as the local ordinances do not prevent anyone from complying with the Political Reform Act. (Section 81013; Regulation 18531.5; *Angus* Advice Letter, No. A-97-173.)

Donors

7. How do donors know whether the committee to which they contribute is governed by limits? As shown above, contributions to a state officeholder who is the subject of a recall are not subject to limits, whereas contributions to replacement candidates are limited. Committees controlled by candidates already must identify the committee by name in solicitations. Also, candidates for elective state office must identify the specific name of the committee and the office sought. (Regulation 18523.1.) The Commission strongly recommends that committees make clear in solicitations whether the committee is subject to limits. A donor should contact the committee before making a donation if the donor is uncertain about the type of committee to which he or she wishes to contribute.

Elected Officer Subject to Recall

8. May an elected state officer who is subject to a recall make expenditures to oppose the recall and expenditures to oppose replacement candidates from his or her committee? Yes. The target officer may make expenditures from a committee established to oppose the qualification of a recall against him or her and to oppose the recall election. Expenditures by the target officer from such a committee may include expenditures to oppose the recall and to oppose the election of replacement candidates.

Replacement Candidates

9. May a replacement candidate control a ballot measure committee established to support a recall? Yes. The Commission has previously advised that a candidate may control a ballot measure committee. (*Kopp* Advice Letters, Nos. A-97-390 and A-97-390a; *Olson* Advice Letter, No. A-89-363; *Leidigh* Advice Letter, No. A-89-170.) Extending this advice to recalls, a replacement candidate may control a ballot measure committee supporting a recall.

10. What does it mean when a candidate “controls” a committee? A candidate “controls” a committee when he or she has a significant influence on the actions or decisions of the committee. (Section 82016.) To determine whether a candidate controls a committee, the FPPC looks at the degree of the candidate’s involvement in the committee’s activities. The involvement of a candidate includes the involvement of his or her campaign committee and his or her agents. (*Roberti* Advice Letter, No. 1-90-339; *Madden* Advice Letter, No. A-85-197.) Although certain activities are not sufficient by themselves to constitute control, each is a factor to be considered in determining whether the candidate controls the committee. For example, soliciting funds on behalf of a committee by itself would not indicate control of the committee. However, such activity is relevant to whether the committee is controlled by the candidate. (*Woodruff* Advice Letter, No. 1-89-180.) On the other hand, a candidate or an elected officer who is a voting member of a committee’s board of directors is presumed to be a “controlling candidate.” (*Ferguson* Advice Letter, No. A-86-044.)

11. Why aren’t contributions to a ballot measure committee controlled by a replacement candidate subject to limits? Contributions to ballot measure committees are generally not subject to limits, based on the Supreme Court case *Citizens Against Rent Control v. Berkeley*. A ballot measure committee controlled by a replacement candidate may accept contributions to support a recall that are not subject to limits (except contributions from other state candidates or officeholders, which are subject to limits under Section 85305). (See Question 19.)

12. May a ballot measure committee controlled by a replacement candidate make expenditures to support the recall and expenditures to promote the replacement candidate’s candidacy from funds not subject to limits? Expenditures to promote a replacement candidate’s candidacy, including payments for communications that expressly advocate the election of the replacement candidate, must be made from the replacement candidate’s committee for office which is subject to the Act’s limits, not from the ballot measure committee. (Sections 85200-85201; Regulation 18521; *Mathys* Advice Letter, No. 1-00-068; *Weems* Advice Letter, No. A-91-448.) According to this rule, any campaign expenditures of a candidate for election to a specific office must be made from the candidate’s committee created for that office. As a result, a ballot measure committee also controlled by the candidate may not make expenditures that promote the candidate’s candidacy. While it may be true that an expenditure by a ballot measure committee that relates solely to the ballot measure question (and thus not subject to contribution limits) may indirectly benefit the candidate’s election campaign, it must do so without making reference to the candidate himself or herself. Thus, expenditures from a ballot measure committee controlled by a replacement candidate may only address the first question on the ballot—whether to recall the elected official.

13. Conversely, may a replacement candidate make expenditures to promote his or her candidacy and to support a recall from his or her committee for office? Yes. All expenditures made by the replacement candidate that promote his or her candidacy must be made from his or her committee for office which is subject to contribution limits. For example, payments for communications that expressly advocate the election of a replacement candidate, and expenditures for a consultant and a poll relating to the replacement candidate’s election must be made from the replacement candidate’s committee for office. In addition, the replacement candidate may make expenditures specifically supporting the recall from his or her candidate committee.

14. If an expenditure by a replacement candidate both promotes his or her candidacy and supports the recall, may the expenditure be apportioned between the candidate's ballot measure committee and his or her candidate committee for office? Yes. If a candidate can clearly show that a part of an expenditure relates solely to the ballot measure issue, the ballot measure committee may pay for that cost. Where such a showing cannot be made, the expenditure must be paid for by the candidate's committee for office. (Sections 85200-85201.)

15. May I make a joint expenditure out of the ballot measure committee and be reimbursed by the committee for office? No. Any expenditures by a candidate that promote his or her candidacy must be made from the candidate committee. (Sections 85200-85201; see Question 12.) A candidate committee may, however, be reimbursed by the ballot measure committee if the costs of the expenditure may be apportioned as indicated above.

Other Committees

16. May a single campaign committee be formed to oppose the recall of two or more officeholders in a recall election? Yes. This committee would be primarily formed and would be subject to any applicable limits. If the committee is controlled by a candidate or officeholder, the committee would also be a controlled committee.

17. May a general purpose committee use its funds to support or oppose a recall effort? Yes. However, contributions made to state candidates (for example, replacement candidates) are subject to contribution limits and must be made from a general purpose committee's "all purpose" account. Contributions to a committee controlled by the target officeholder to oppose the recall may be made from either the "all purpose" or "restricted use" account. (*Harrison Advice Letter*, No. A-03-201.)

18. Are non-controlled committees primarily formed to support or oppose a replacement candidate subject to limits? They are subject to the \$6,000 per contributor limit if they make contributions to state candidates. (Section 85303.) If such committees do not make contributions to state candidates, but only make independent expenditures for or against replacement candidates, they are not subject to contribution limits. (*Buckley v. Valeo*.)

19. Are contributions made by other elected officials to the target candidate or to a replacement candidate's controlled recall committee subject to limits? Yes. Under, the Act's provisions restricting transfers of funds, candidates (and officeholders) for elective state office (and their controlled committees) may not make contributions to *any* committees controlled by other state candidates in excess of \$3,600, including a state candidate's controlled committee supporting or opposing a recall. (Section 85305; Regulation 18535.)

Other Provisions of the Act

20. How do other contribution rules and the prohibition on independent expenditures by controlled committees (Section 85501) apply to a state recall? Under Section 85501, a candidate controlled committee may not make independent expenditures. However, a

candidate's expenditures against his or her opponents are not considered "independent expenditures" subject to the prohibition of Section 85501. Accordingly, expenditures made by the target officer to oppose replacement candidates are not independent expenditures prohibited by Section 85501. Likewise, expenditures made by replacement candidates to oppose the target officer and other replacement candidates are not independent expenditures prohibited by Section 85501. The target officer would, however, be prohibited under Section 85501 from making independent expenditures from any controlled committee of his or hers expressly advocating the election of a replacement candidate. Also, a candidate controlled ballot measure committee may not make contributions to support or oppose candidates, including the candidate who controls the ballot measure committee. (*Mathys* Advice Letter, No. 1-00-068; *Weems* Advice Letter, No. A-91-448.)

21. How do the advertising disclosure provisions (Sections 84501-84511) apply to a state recall? State and local ballot measures advertisements are required to contain disclosures naming major contributors. The name of a ballot measure committee (to support or oppose the recall) must meet certain identification requirements that identify interests of the major donors. Also, independent expenditures to support or oppose a candidate or ballot measure must identify the committee making the expenditure and its major contributors.

22. Is the committee controlled by the target officer to oppose the recall subject to the advertising disclosure provisions? Yes. The target officer's committee must identify major contributors of \$50,000 or more in its advertisements, but is not required to include those interests in the name of the committee. (Section 84503; Regulations 18450.1-18450.11; *Bauer* Advice Letter, No. A-07-140.) The word "recall" and the name of the target officer must be part of the name of the target officer's controlled committee. (Regulation 18531.5(c)(1).)

23. How do the issue advocacy disclosure provisions (Section 85310) apply to a state recall? Section 85310 requires disclosure of communications identifying a state candidate made within 45 days of an election. This provision is designed to provide disclosure of large payments (\$50,000 or more) for communications used for issue advocacy campaigning. Payments for such election-related communications identifying a state candidate might otherwise go undisclosed because they do not expressly advocate the election or defeat of a state candidate, and are therefore not required to be reported as independent expenditures. The disclosure requirements of Section 85310 apply in a state recall election to certain payments for communications identifying state candidates that are not otherwise disclosed. (If a payment for a communication identifying a state candidate is otherwise reported as an independent expenditure, the payment need not be reported under Section 85310.)

Filing Obligations

24. What are a proponent's filing obligations? An important consequence of recalls being treated as ballot measures is that a person or group of persons who raises or spends more than \$1,000 for a potential recall attempt will not be a "committee" pursuant to Section 82013 until the target of the recall is served with a notice of intention to circulate a recall petition and the notice is filed and published, or posted pursuant to Elections Code Sections 11006 and 11021. However, once this notice is given, the committee must report on its first campaign statement all

contributions received and expenditures made for the purpose of influencing the electorate to sign a recall petition or to vote for or against a recall election regardless of when the contributions or expenditures were made.

25. What are officeholders' and replacement candidates' filing obligations? An officeholder who is the subject of a recall must disclose all contributions received and expenditures made in anticipation of a recall election, even if the officeholder has not been served with notice of intention to circulate a recall petition. A replacement candidate must also disclose all contributions received and expenditures made pursuing election even if the subject of the recall has not been served with a notice of intention to circulate a recall petition.

A committee's filing obligations during a recall election are as follows: generally speaking, proponents of a recall, the target of the recall, and replacement candidates must file two pre-election campaign statements. In addition, all committees must make the usual semi-annual filings, and ballot measure committees must make the required quarterly filings. State candidates and primarily formed state ballot measure committees that are required to file reports electronically must also file the applicable 10-day and election cycle reports disclosing contributions received of \$5,000 and \$1,000, respectively. Late contribution reports are also required during the 16-day period prior to any state or local election. Candidates and committees should refer to the appropriate campaign disclosure manual for detailed information.

The officeholder who is the target of the recall has several options regarding what campaign account to use so long as it is consistent with the one bank account rule and other fundraising restrictions of Proposition 34 or local law. He or she may use his or her existing campaign bank account (if any), an account formed for a future election (if any) to the same office, or establish a separate ballot measure committee to support or oppose the recall. Section 85315 specifically provides that a state officer who is the target of a recall may open a new campaign committee and account to oppose the recall. A replacement candidate must open a new bank account and committee to run for office. All of these committees would be candidate controlled, and Form 410 (statement of organization) must be on file. A replacement candidate must also file the Form 501 (candidate intention).

26. How does a committee determine its filing schedule? For state elections, the Commission publishes filing schedules on its web site. For local elections, contact the city or county elections official in the jurisdiction holding the election. In addition, the Commission's manuals for candidates and committees explain how to determine when and where filings must be made.

27. If a general purpose or other committee makes contributions or independent expenditures in connection with a recall, are any special reports required? Yes. State committees that are required to file their campaign reports electronically with the Secretary of State may be required to file additional electronic reports in connection with the recall of a state officer. If the committee makes contributions totaling \$5,000 or more to a committee established by the target officer to oppose the recall, or to any committee primarily formed to support or oppose the recall, an electronic report must be filed within 10 days. Contributions to another general purpose committee that is making expenditures to support or oppose the recall may also

trigger a 10-day report. (Section 84204.5; Regulation 18466.)¹ Independent expenditures totaling \$5,000 or more to support or oppose the recall also must be reported within 10 days or, if independent expenditures totaling \$1,000 or more are made during the 90-day election cycle before the recall election, a report must be filed within 24 hours. (Sections 84204.5 and 85500.) Late contribution reports are required during the 16-day period prior to any state election. (Section 84203.)

28. Where will a committee primarily formed to support or oppose the recall of a state officeholder file its campaign statements? The committee will be considered a state ballot measure committee and file reports with the Secretary of State, County of Los Angeles, and the County of San Francisco.

After the Recall Election

29. What may a candidate controlled committee do with remaining funds after the recall effort is finished? The funds of a candidate controlled committee become surplus funds under section 89519 after a recall. Section 85315(b) provides that after a recall petition or election is finished, the target state officer's recall committee must wind down its activities. Its remaining funds are treated as surplus under Section 89519(b) and must be spent within 30 days.

30. What may a ballot measure committee (formed primarily to support or oppose a recall effort) do with funds remaining after the recall effort is finished? Generally speaking, the committee may spend its funds on anything that is reasonably related to a political, legislative, or governmental purpose, if there is no personal benefit to an officer of the committee. Also, if the committee would like to remain in operation, it may do so. However, the statement of organization may have to be amended to reflect the new purpose of the committee and the committee must file applicable campaign reports.

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¹ Section 84204.5 went into effect on January 1, 2007. (Chapter 438; Stats. 2006.) Because Section 84204.5 has not previously been analyzed in connection with recall elections, this advice is prospective as of April 4, 2008.